THE CONSTITUTION OF THE UNITED STATES IN CIVIL WAR.

THE culmination of the differences between the sections in a definite political act occurred at a moment when the government was in the hands of that party whose principles were most susceptible of adaptation to the policy of the secessionists. Though the direct question of state or national supremacy was not met in the platform of either of the great parties in 1860, all the traditions of the Democracy were on the side of a strictly limited central government. For many years, now, the accepted narcotic for quieting any nervousness caused by threats against state-rights had been the soothing formula: "Each government is sovereign within its sphere." The assertion in December of 1860 that South Carolina's "sphere" included the right to dissolve the Union, called for some decisive action in spherical delimitation.

President Buchanan had been with the extreme Democrats on the Territorial question. The rights and equality of all the states he had insisted on maintaining with the utmost care. But the demand that he should acknowledge what after all is only the logical conclusion of the state-rights doctrine, was more than he was prepared to accede to. His message, on the meeting of Congress in December, was a striking illustration of the difficulty with which all thoughtful Democrats were confronted by the action of South Carolina. Any such state-right as that of secession, he claimed, was "wholly inconsistent with the history as well as the character of the federal constitution"; and his argument in support of this view contained practically all that had ever been said on the subject. Still he was far from excluding the idea of a "sphere" by which the central government was limited. "This government," the President stated, "is a great and powerful government, invested with all the attributes of sovereignty over the special subjects

to which its authority extends." Not one man in the United States, probably, would have denied that. The whole constitutional development of the country had proceeded upon exactly that doctrine. But the President did not penetrate to the root of the difficulty by explaining definitely how the scope of those special subjects was to be determined. He did indeed refer to the wisdom of "the fathers" in adopting the rule of strict construction of the constitution; but all the world knew the unsatisfactory nature of that formula. No better illustration of its uselessness was needed than the results that were derived in the message itself from the application of the principle in the present crisis.

After reaching the conclusion that there was no constitutional right in a state to secede, he next examined the position of the executive under the circumstances. Following an opinion of Attorney-General Black,[1] he concluded that existing laws did not empower him to bring force to bear to suppress insurrection in a state "where no judicial authority exists to issue process, and where there is no marshal to execute it, and where, even if there were such an officer, the entire population would constitute one solid combination to resist him." His conclusion itself was reached by an exceedingly strict construction of the law of 1795, in reference to calling out the militia.[2] Having thus disclaimed any power in himself to resort to arms, he put the question: "Has the constitution delegated to Congress the power to coerce a state into submission which is attempting to withdraw, or has actually withdrawn from the confederacy?" Not being able to discover such a power among those delegated to Congress in the constitution, and not considering it "necessary and proper for carrying into execution" the enumerated powers, the President could not answer the question in the affirmative. "Without descending to particulars," he said, "it may be safely asserted that the power to make war against a state is at variance with the whole spirit and intent of the constitution."

[1] McPherson, Rebellion, p. 51.

[2] U.S. Statutes at Large, I., 424.

Such was the rather disheartening result of an examination of the situation from a strict-constructionist standpoint. A state had no right to secede, and the federal government had no right to prevent it from seceding. It was evident that if such were the true state of the case, a right must be evolved from somewhere to fill the vacuum. Much abuse has been heaped upon Mr. Buchanan as the originator of this constitutional paradox. Far from being responsible for it, however, he was only unfortunate in having to officially proclaim the disagreeable consequence of a long-established theory of governmental relations. The fixed form in which for years the doctrine of sovereignty had been enunciated by every department of the government was that referred to above. The relative force of federal and state action, when in conflict, was a question that had been sedulously avoided. Once only, in 1832, had the issue been fairly presented, but the result of the nullification controversy had given no conclusive answer. The Supreme Court had maintained an unbroken line of precedents on the double sovereignty basis.[1] It had asserted the supremacy of the federal laws, so far as they were within the powers granted or implied in the constitution, but it had admitted that many cases of dispute could arise in which the judiciary could not be called upon to give judgment. In such questions, of a political rather than a judicial character, the final authority as to the constitutionality of a given law was, by the doctrine of "spheres," undetermined. Though the ultra state-rights school of Calhoun had given a perfectly clear and definite solution to the problem, and Webster on the other hand had been equally explicit in his contradictory answer, it must be admitted that the general course of governmental action, and more important still, perhaps, the prevailing sentiment of the people as a whole, had followed the middle line of which the conservative Madison was a conspicuous adviser.

From this standpoint the only constitutional course in case of a conflict of the "sovereignties" was to deny that such a thing was possible, eulogize the constitution as the greatest

[1] Brightly's Federal Digest, p. 142.

extant production of the human intellect, point out the dreadful consequences that would follow the recognition of supremacy in either claimant, and end by compromising the difficulty in such a way as to furnish precedents for both sides in the future. It would be erroneous to maintain that this method of action was as unprofitable as it was illogical. On the contrary, it was probably the only course that could have brought the United States intact through to the year eighteen hundred and sixty. But more than one of the Nation's true statesmen foresaw that it was only a question of time when "dodging the issue" would cease to give satisfaction as a principle of constitutional construction.

It was not understood by President Buchanan, or by the mass of the people, that the secession of South Carolina was the knell of the old principle. Mr. Buchanan promptly adopted the time-honored method of meeting the difficulty. His message eulogized the constitution, and affirmed the supremacy of the general government in its sphere; he referred with emphasis to the reservation of rights to the states, and recoiled with horror from the idea of using force to preserve the Union, even if the power to do so were conferred. To Congress was left the devising of measures necessary to the circumstances, the President's only recommendation being an explanatory amendment to the constitution. The amendment, he thought, should deal not with the fundamental question, but with the *status* of slavery, with a view to "forever terminate the existing dissensions, and restore peace and harmony among the states."[1]

The executive having thus failed to free itself from the shackles which precedent imposed, what did Congress effect in the way of meeting the emergency? In the House a special committee of one member from each state was appointed, to consider as much of the President's message as referred to the perilous state of the country. A special committee of thirteen was likewise appointed in the Senate. The most casual examination of the enormous mass of propositions submitted to

[1] McPherson, History of the Rebellion, p. 50.

these committees, as well as to the Houses directly, will reveal the confidence that still remained in the "compromise" method of determining controversies, as well as the utter hopelessness of its successful application to the existing difficulty.[1]

The attention of Congress was directed chiefly to such measures as were embodied in the report of the House special committee, and in the resolutions proposed in the Senate by Crittenden of Kentucky. The Senate's special committee reported a failure to agree upon any general scheme of adjustment. The only proposition of the House committee's report that assumed the character of a law was that proposing an amendment to the constitution in these words: "No amendment shall be made to the constitution which will authorize or give to Congress the power to abolish or interfere, within any state, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said state." This proposition secured the necessary two-thirds in both the House and the Senate, only the radical Republicans opposing it,[2] and was ratified by the legislatures of Ohio and Maryland before its uselessness was appreciated.

It was upon the Crittenden resolutions, in the Senate, that the friends of Union through conciliation based their final hopes. The plan was directed entirely to a settlement of the slavery question. It provided for constitutional amendments dividing all United States territory by the 36° 30′ line, and recognizing slavery south of the line, while prohibiting it north. States formed from this territory were to be admitted upon reaching a population requisite for a member of Congress, and were to make their own choice as to slavery in their constitutions. The power to abolish slavery within its jurisdiction was denied to Congress, if the places concerned should be within the limits of states permitting slavery. The interstate slave trade was put beyond the interference of Congress, and the United States was required to compensate any owner for a fugitive slave violently rescued from him, at the same time

[1] For digest of the propositions, see McPherson, Rebellion, p. 52 *et seq.*

[2] *Ibid.*, p. 59.

having action to recover the amount from the county in which the rescue was effected. Such a scheme did not seem to offer much consolation to the Republicans, who had made it their cardinal principle that slavery was too horrible a thing to come under the express recognition and protection of a free government. The resolutions were opposed by the united front of the Republican senators, and finally, after the withdrawal of most of the Southern delegation, they were rejected, on the second of March, by a vote of 19 to 20.[1]

The Congress and the administration came to an end on the fourth of March, 1861. How did the constitutional question stand then? Had any advance been made toward an answer to the vexed question of sovereignty? The record sketched above tells the gloomy tale. An emasculated national sovereignty had been proclaimed by the executive; a vigorous state sovereignty had been actively asserted by seven of the commonwealths of the Union; and no position whatever had been assumed by the federal legislature.

I. *Principles of the Appeal to Arms.*

It would be misleading to pass without notice the idea of executive duty on which Mr. Buchanan based his action in reference to the forts and other property of the United States in the South. His denial of the right of secession precluded, of course, any recognition of the independence of the withdrawing states. Accordingly, a demand of the commissioners from South Carolina for the removal of a hostile military force from her soil was simply disregarded, and no admission was allowed of her claim of eminent domain. Attorney-General Black had advised the President, that "the right of the general government to preserve itself in its whole constitutional vigor by repelling a direct and positive aggression upon its property or its officers, cannot be denied."[2] The attitude of the administration was therefore manifested in its orders to the com-

[1] McPherson, Rebellion, p. 64.
[2] McPherson, Rebellion, p. 52.

mander of Fort Sumter to stand strictly on the defensive, but to act vigorously if assailed.

In his personal defence, written after the war, Mr. Buchanan assigns as a reason for maintaining this position, that he was above all things desirous of avoiding bloodshed, and had high hopes of adjusting the difference by negotiation.[1] He had most convincing assurances that any aggressive action on his part would promptly lead to the withdrawal of several hesitating states; and, with the slender means at his disposition, he concluded that a preservation of the *status quo* was the most feasible as well as the most patriotic plan. It must be remembered, however, that Mr. Buchanan never abdicated the duty of administering justice and collecting the revenue in the seceded states. He declared his intention of performing these duties as soon as Congress should pass laws requisite to the novel circumstances. In case of action upon this line, armed collision with the state power would have resulted from the attempt to collect United States taxes. As a matter of fact, however, the opening of hostilities was precipitated on the issue of defending government property.

It will be profitable to determine as precisely as possible the theory of the constitution and governmental relations upon which the exercise of force by the new administration proceeded. Mr. Lincoln's inaugural address was extremely moderate in tone. He did not announce any policy distinguishable from that of his predecessor. Under the impulse of actual hostilities, however, the contempt of the President for the state-sovereignty doctrine assumed a decidedly aggressive form. His message to Congress at the opening of the special session on July 4 contained a severe denunciation of the dogma. The time had come for assuming a position that should at least be clear and intelligible; and the President planted himself unequivocally on the theory of national sovereignty. As his definition of a "sovereignty" he accepted this: "A political community without a political superior."

[1] Mr. Buchanan's Administration on the Eve of Rebellion, ch. ix.

> Tested by this [he said] no one of our states, except Texas, ever was a sovereignty. And even Texas gave up the character on coming into the Union. . . . The states have their *status* IN the Union, and they have no other legal *status*. . . . The Union is older than any of the states, and, in fact, it created them as states. Originally some dependent colonies made the Union, and, in turn, the Union threw off their old dependence for them, and made them states, such as they are. Not one of them ever had a state constitution independent of the Union.[1]

Such were the steps by which Lincoln reached his position of national supremacy. If a vote had been taken in 1861, in the Northern states alone, on the abstract constitutional question at issue, the President's view would in all probability have been defeated. But so skilfully were the theoretical assumptions blended with appeals to the Union sentiment of the people, that the whole doctrine enunciated in the message was accepted without discrimination. The same passion for territory which had made popular the extension of the boundaries to the Pacific, now clamored for the maintenance of the domain in its integrity. One theory of the constitution could not maintain it; the other could, and the other must be adopted.

The promptness of Congress in adopting measures for enabling the President to carry out his doctrine is sufficient evidence that the legislative department was one with the executive in his views of the constitution. The object of the war was the subject of numerous resolutions proposed in both houses. But the majority showed no disposition to discuss abstractions when actions would more clearly proclaim their opinions. Hence, but one formal declaration of intention came to a vote. This was a resolution to the effect that the war forced upon the country by the disunionists of the South was

> not waged in any spirit of oppression, or for any purpose of conquest or subjugation, or purpose of overthrowing or interfering with the rights or established institutions of those [the Southern] states, but to defend and maintain the supremacy of the constitution, and to preserve the Union with all the dignity, equality, and rights of the several states unimpaired.[2]

[1] McPherson, Rebellion, p. 127.
[2] McPherson, Rebellion, p. 286.

It is beyond question that this declaration expressed the feelings of two-thirds of the Northern people at this time. The resolution, though not passed in joint form, was adopted by both House and Senate separately, with no substantial difference in the wording. In each case the vote was almost unanimous. On its face, the end of the war is proclaimed to be, not the overthrow of slavery, but the preservation of the Union. In respect to the dignity and rights of the states, the expression of intention is clearly inconclusive; for there were very widely varying views as to what was the extent of such dignity and rights under the supreme constitution. Were the rights to be preserved those that were claimed by the state-sovereignty politicians, or only such as were conceded by the centralizing school? All that appeared unmistakable was that some form of state organization was to be maintained when the rebellion was subdued.

But, even without any more definite declaration of Congress, it cannot be questioned that the doctrine of sovereignty enunciated by the President's message was the doctrine upon which the legislature planted itself for the struggle. Whatever may have been the defects of the theory, it certainly did not lack clearness and consistency. The Nation is sovereign; the states are local organizations subordinate to the Nation. The general government represents the Nation, and is limited in no way by the local state governments, but only by the federal constitution. Of this constitution, however, the departments of the central government are the final interpreters; the limitations of the constitution, therefore, are practically guarded only by the mutual responsibility of the departments in action, and by the accountability to the people in the elections.

II. *The War Power.*

The circumstances in which the government found itself after the fall of Sumter, were entirely unprecedented. The President was obliged to regard the uprising of the South as a simple insurrection; but the only parallel case, the Whiskey Insurrec-

tion in Washington's administration, was so insignificant in comparison, that from the very beginning a system of original construction of the constitution had to be employed to meet the varied occasions for executive as well as legislative action. Long before the end of the war, the principles thus evolved had become so numerous and so far-reaching in their application, as to entirely overshadow the most cherished doctrines of the old system.

From the very outset the basis of the government's war power was held to be the necessity of preserving the Nation. The limit of its application was not the clear expressions of the organic law, but the forbearance of a distracted people. That this forbearance extended so far as it did, is significant. The "necessity" thus sanctioned was not the exigency of individual liberty that prompted the Declaration of Independence, but the mortal peril of a conscious nationality. For a third time in a hundred years, the conviction of a fact beat down the obstacles of established forms. The revolution of 1776 secured liberty; that of 1787 secured union; and that of 1861–67 secured the unity of the Nation. In each case traditional principles were felt to be incompatible with existing facts, and the old gave way to the new. The question presented to the administration by the commencement of hostilities was: "Has this government the power to preserve its authority over all its territory?" The answer of the old school of constitutional lawyers was: "Yes, so far as it is conferred by the constitution and the laws" — but the answer we derive from the actual conduct of the war is "Yes" without qualification.

Immediately upon the fall of Sumter, the assertion of the new doctrine began. Before the assembling of Congress, July 4, six distinct proclamations were issued by the President, calling into play forces deemed necessary to the preservation of the Nation. The calling out of the militia was based upon the law of 1795. Buchanan had declined to consider this law as applicable to the present circumstances. His delicacy, however, was a phase of his scruples about coercing a state — scruples entirely foreign to his successor. It is enacted by the law in question that

whenever the laws of the United States shall be opposed, or the execution thereof obstructed in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the President of the United States to call forth the militia of such state, or of any other state or states, as may be necessary to suppress such combinations, and to cause the laws to be duly executed.[1]

Buchanan's interpretation of this was that the militia was to be employed only as a *posse comitatus* to assist in executing a judge's writ.[2] While this may have been the immediate idea of the framer, there was not the remotest allusion to such an intent in the law itself, and it was no extraordinary stretch of construction for Lincoln to act in accordance with the plain terms of the statute. His proclamation avoided any reference to the state governments. And the theory of mere individual uprising was rounded out by including the governors of the seceded states in his call for troops.

Four days after the call for volunteers, the President's purpose of ignoring the connection of the state governments with the rebellion was put to a severe test in his proclamation of a blockade of the ports of the cotton states. He was obliged to speak of "the pretended authority" of those states, but only to declare that persons under such authority molesting United States vessels would be treated as pirates. This assumption by the executive of the right to establish a blockade was rather startling to conservative minds. It seemed like a usurpation of the legislative power to declare war. For blockade is an incident of actual warfare, and involves the recognition of belligerent rights. The constitutionality of the President's action, however, was affirmed by the Supreme Court in the Prize Cases,[3] and hence, Congress having acquiesced, it has the sanction of all three departments of the government. Accordingly, the President, as commander-in-chief, can determine, without reference to Congress, the time when an insurrection has attained the pro-

[1] U. S. Statutes at Large, I., 424.

[2] Attorney-Gen. Black's opinion: McPherson, Rebellion, p. 51.

[3] 2 Black, 635.

portions of a war, with all the consequences to person and property that such a decision entails.

A further action of the President previous to the meeting of Congress was the call for the enlistment of forty thousand volunteers, and the increase of the regular army by over twenty thousand men, and the navy by eighteen thousand. Mr. Lincoln himself doubted the constitutionality of these measures.

> Whether strictly legal or not [he says], they were ventured upon under what appeared to be a popular demand and a public necessity, trusting then as now that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.[1]

This frank substitution of a "popular demand" for a legal mandate, as a basis for executive action, is characteristic of the times. The President's course was approved and applauded. Howe, of Wisconsin, proclaimed in the Senate that he approved it in exact proportion to the extent to which it was a violation of the existing law.[2] The general concurrence in the avowed ignoring of the organic law emphasizes the completeness of the revolution which was in progress. The idea of a government limited by the written instructions of a past generation had already begun to grow dim in the smoke of battle.

The remaining subject dealt with in the President's proclamations, was the suspension of the writ of *habeas corpus*. Southern sympathy in Maryland had taken so demonstrative a form that summary measures of repression were resorted to by the government. General Scott was authorized by the President to suspend the writ of *habeas corpus* at any point on the military line between Philadelphia and Washington. This assertion by the executive of the absolute control of the civil rights of the individual in regions not in insurrection excited rather more criticism than the measures which would unpleasantly affect only the rebellious states. A case was promptly

[1] Message of July 4, 1861. McPherson, Rebellion, p. 126.

[2] Globe, 1st session, XXXVII. Congress, p. 393.

brought before Chief Justice Taney for judicial interpretation. Justice Taney's opinion[1] took strong ground against the constitutionality of the President's act. The clause of the constitution touching the matter says: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."[2] The implication is that in the cases mentioned the privilege may be suspended, but the clause is silent as to who shall do it. Precedent and authority were certainly with the Chief Justice in regarding the determination of the necessity as a function of the legislature. But to have awaited the meeting and action of Congress in the present case might have been to sacrifice the government. Lincoln therefore availed himself of the latitude of construction possible by the wording of the clause. Attorney-General Bates sustained the President in an elaborate opinion. His ground was that in pursuance of his obligation to execute the laws, the President must be accorded the widest discretion as to means. The use of military force to suppress insurrection was authorized by the constitution, and when such means had been determined upon by the executive, all the incidents of warlike action must necessarily be included. Nor could the judicial department, being a co-ordinate, and not a superior branch of the government, interfere.[3] The position of the executive in this matter was entirely consistent with that assumed in the establishment of the blockade. Granting the right in the President to decide when war has technically begun, both the powers in question spring naturally from the recognized authority of the commander-in-chief. In the interval between April 12 and July 4, 1861, a new principle thus appeared in the constitutional system of the United States, namely, that of a temporary dictatorship. All the powers of government were virtually concentrated in a single department, and that the department whose energies were directed by the will of a single man.

[1] McPherson, Rebellion, p. 155.

[2] Art 1, sec. 9, clause 2.

[3] For the opinion, see McPherson, Rebellion, p. 158.

The dictatorial position assumed by the President was effective in the accomplishment of two most important results, namely, the preservation of the capital and the maintenance of Union sentiment in the wavering border states. These ends achieved, the administration of the government fell back once more into the old lines of departmental co-ordination. Congress labored with the utmost energy to fill the gaps which the crisis had revealed in the laws. Small heed was given to the demands of the minority for discussion of the great constitutional questions that constantly appeared. The decisive majorities[1] by which the Republicans controlled both houses enabled work to be transacted with great vigor.

The first imperative duty of the legislature was to provide for defining the nature and extent of the insurrection which the President reported as existing. It has been shown how the executive had declined to recognize the state organizations as elements of the uprising against the general government. Congress necessarily adopted the same policy. Its measures were made to refer primarily to combinations of individuals against the laws of the United States. But in the act of July 13, 1861, section five, the attitude of the state governments toward such combinations was taken into consideration as a means of determining the location and extent of the insurrection. In this section the obligation upon the state authorities to support the laws of the United States was distinctly assumed, and the refusal to fulfil this obligation was made sufficient ground for proclaiming all the inhabitants of the delinquent community public enemies. The law in question, commonly called the "non-intercourse act,"[2] re-enacted the main features of the law by which President Jackson was empowered to collect the duties in nullification times; the fifth section provided further, that when the militia should have been called forth by the President to suppress the insurrection,

[1] Practically 28 in a Senate of 50, and 92 in a House of 178. See Tribune Almanac for 1862, pp. 17 and 19.

[2] Public Acts of the XXXVII. Congress, 1st sess., ch. iii.

and the insurgents shall have failed to disperse by the time directed by the President, and when said insurgents claim to act under the authority of any state or states, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such state or states, or in the part or parts thereof in which said combination exists, nor such insurrection suppressed by said state or states, then and in such case it may and shall be lawful for the President, by proclamation, to declare that the inhabitants of such state, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such hostility shall continue.

A proclamation in pursuance of the authority thus granted was issued by the President on August 16. From that time the condition of territorial civil war legally and constitutionally existed in the United States, with all the consequences of such a condition which the law of nations recognizes. Congress had exercised its power to declare war, or, what has been admitted to be the same thing, to recognize a state of war as existing. From the time of such recognition, the acts of the President involving technical war powers were unquestionably in accordance with the constitution.

Upon the passage of the "non-intercourse act," both political departments of the government had given their recognition to the fact that all the inhabitants of certain portions of United States territory were at war with the government and its loyal supporters. The duty of each department thereupon was to use all constitutional means to overcome in the shortest time possible the resistance to their authority. To what extent a strict interpretation of the organic law would reveal adequate powers, was a question; but the spirit of the people and general ideas of necessity were convenient sources of authority that never failed of application when the direct mandate of written law was insufficient. A question that arose immediately was in reference to personal and property rights of dwellers in the insurrectionary districts. Such persons were still, in the theory of the government, citizens of the United States; but were

they, as such, entitled, under the present circumstances, to the protection of their civil rights which is normally secured by our system?

War is the negation of civil rights. Granting the power in Congress to recognize certain of its citizens as public enemies in the technical sense, the exercise of that power puts in the hands of the government a control over the life, liberty and property of all whom it so regards, limited only by the dictates of humanity and a respect for the practice of nations. The insurgents become, in short, belligerent enemies, with the rights and duties which international law ascribes to such. From the moment that they assume that character the constitutional guarantees of civil liberty lose their effect as against the executive. It becomes authorized to enforce submission to the laws by bullets, not by indictments. "Due process of law" ceases to be the necessary condition to a deprivation of civil rights. All the safeguards so carefully constructed by the constitution for the protection of United States citizens against oppression by their officers and legislators disappear when resistance by those citizens to law becomes so formidable as to be deemed war.

Such was the theory upon which the exercise of the war power was based by all three departments of the government. The Supreme Court, though divided, in the Prize Cases, upon the question of the exact time when the attitude of belligerency could be assumed, was unanimous in respect to the consequences after that time had arrived. Justice Nelson, dissenting, said:

> There is no doubt the government may, by the competent power, recognize or declare the existence of a state of civil war, which will draw after it all the consequences and rights of war between the contending parties, as in the case of a public war. . . . The laws of war, whether the war be civil or *inter gentes*, convert every citizen of the hostile state into a public enemy.[1]

At the outbreak of the insurrection, then, two distinct courses lay open for the government to pursue. It could

[1] 2 Black, pp. 688, 693.

elect to repress the uprising by the civil power, through process of the courts, with the military arm as the marshal's *posse;* the insurgents then would be subject to treatment like ordinary criminals. Or, on the other hand, the rebels could be recognized as belligerents and subdued by the exertion of military power alone. In the latter case, the insurgents would seem to be entitled to the treatment which public law secures to armed public enemies. But the question early arose, could not the government follow both courses at the same time, and be guided in its dealings with the rebels by international or by constitutional law, at its discretion? Could it not, for example, hang as traitors rebels taken in battle as prisoners of war? A practical application of some principle was early called for. In the fall of 1861 the crew of the Confederate privateer *Savannah* were brought as captives to New York, and were convicted of piracy. The proceeding was in accordance with Mr. Lincoln's blockade proclamation, which ended with a declaration that rebels molesting United States vessels, should be thus dealt with. But the penalty was never enforced against the prisoners, for the reason that Mr. Davis announced his intention to visit exactly the same treatment that was accorded them, upon an equal number of prisoners in his hands.[1]

The course of the administration in reference to the exchange of prisoners and other matters was dictated by the same reasoning. It was desired to secure all the advantages which flowed from the exercise of the war power by the government, while not conceding belligerent rights to those against whom that power was employed. There was a strong political element which maintained that the recognition of the rebels as belligerents would be equivalent to acknowledging their independence. It was on this doctrine that Thaddeus Stevens later built his conquered-province theory in respect to the status of the Southern states at the close of the war. But the developments of the conflict led to the working out of a policy, which, without attributing official recognition to the Confederate government, sanctioned the doctrine that, as regarded individuals

[1] Annual Cyclopedia for 1861, pp. 585, 591.

in the insurrectionary districts, the United States government had the rights of both sovereign and belligerent. This idea was wrought out most distinctly in the measures adopted for the confiscation of property in the rebel states.

The first step taken by Congress in this direction was the act of Aug. 6, 1861.[1] It made it the duty of the President to seize, confiscate and condemn all property used in aiding, abetting or promoting the present or any future insurrection against the government of the United States. Section four provided for the forfeiture of slaves employed in any military or naval service against the government and authority of the United States. This act was passed by virtue of the war powers of Congress. It was a legislative authorization for the exercise of an acknowledged belligerent right. For the purpose of freeing the slaves, the ultra anti-slavery men were perfectly willing to sacrifice their old scruples about regarding men as property, and the provision was defended on the same ground as the rest of the bill.

This first act was somewhat crude and unsatisfactory in detail, but was in principle quite definite and distinct. War had been recognized as existing, and Congress had exercised the constitutional power of making "rules concerning captures on land and water." But during the next session of the thirty-seventh Congress, the full development of the war gave rise to a more bitter spirit, which manifested itself in more radical and questionable measures. Many propositions looking to confiscation and emancipation were brought forward in both houses, and the debates upon these subjects were long and acrid. The dominant party became quite distinctly divided on the general policy of the war; and, back of all, the idea of finding in the existing crisis a definite settlement of the slavery question assumed a steadily increasing importance.

It had been determined that the crimes of the secessionists called for vindictive punishment, but serious constitutional difficulties were found to beset the path of the avengers. The House first passed a bill which surmounted all obstacles with

[1] Public Acts of the XXXVII. Congress, 1st. sess., ch. lx.

gratifying ease. It simply provided that all property of whatever description, belonging to certain described classes of persons, was forfeited to the government of the United States, and declared lawful subject of seizure, and of condemnation. The judiciary committee of the Senate, to whom this and other bills were referred, recognized some of the objections that could be raised to the House proposition, and so reported a modification of it. By this it was enacted that the forfeiture should take effect only upon the property of persons "beyond the jurisdiction of the United States," or of persons in any state or district of the United States where, on account of insurrection or rebellion, the ordinary judicial process could not be served upon them, whenever such persons should be found in arms against the United States, or abetting the existing rebellion; and the title to the property was to vest in the United States immediately upon the commission of the act, so that any subsequent alienation by the former owner would be void.

Each of these bills assumed the power in Congress to deprive several millions of persons of all their property, and this by simple legislative act. By the theory of our constitution, such power must be granted by the organic law, or be inferable from some clearly granted power. There was no claim of an express grant. By implication, the power was held to be deducible from the clauses authorizing Congress "to declare war," "to make rules concerning captures on land and water," "to provide for calling forth the militia to . . . suppress insurrections," and finally, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." On the other hand, the constitution contains the following prohibitions: "No bill of attainder . . . shall be passed;" "no person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation;" and finally, "no attainder of treason shall work . . . forfeiture except during the life of the person attainted." The exercise of authority under the grants above enumerated involved of necessity the violation of the above prohibitions. Respect for both at the same time was inconceivable. The

only escape from the dilemma was to assume that the constitution contemplated a state of affairs to which the prohibitions were inapplicable. And that indeed was the position taken by the advocates of confiscation. The existence of a state of war was held to bring into the sphere of legislative action any measures necessary to weaken the enemy that were recognized by the great system of international practice. But modern international practice does not favor the general confiscation of enemies' private property.

The strong objections presented, on principles of both constitutional and international law, sealed the fate of both bills. The whole matter was finally referred back to the Senate judiciary committee and a compromise bill was patched up from the many propositions that had been submitted during the long debate. This last bill, with slight alterations, together with an explanatory resolution, framed to overcome certain constitutional scruples of the President, became at last the law.[1] The first four sections fixed very severe penalties for the crimes of treason and rebellion, the latter being an addition to the catalogue of felonies. These were taken from the suggestions of the more conservative Republicans, like Collamer, of Vermont, who expressed a strong desire to get at the property of the rebels, but insisted upon doing it by regular judicial procedure.[2]

Sections five, six, seven and eight, referred to confiscation proper. The President was directed to cause the seizure of all the property, of whatsoever kind, belonging to specified classes of persons, namely, officers of the rebel army or navy, officers of the civil administration of the so-called Confederate States, governors, judges, or legislators of any of said states, ex-officials of the United States hereafter holding office under the Confederate States, and persons owning property in loyal states who should give aid and comfort to the rebellion. Further, if any other person, being engaged in the rebellion, or giving it aid and comfort, should not cease within sixty days of a proclamation to be issued by the President, such person's property should be liable

[1] Public Acts of the XXXVII. Congress, 2d sess., ch. cxcv.

[2] Globe, 2d sess., XXXVII. Cong., p. 1812.

to seizure in like manner. The property so seized was to be proceeded against by action *in rem* in the United States court, and condemned and sold as enemies' property, and the proceeds were to be used for the support of the army of the United States.

As an abstract right of war, such condemnation of private property was unquestionably in the power of Congress. Civilized nations, however, have generally recognized the expediency of a different policy. Real estate is in general left to its owners, and movables are appropriated only so far as military necessity, as judged by the commander in the field, seems to demand it.[1] Some vague idea of such a justification seems to have suggested the clause devoting the proceeds of the confiscations to the support of the army. But it was rightly argued that the determination of the army's necessities was a function of the President, and not of Congress, and that legislation in such a case was superfluous.[2] It appeared, however, from further developments, that the act was not based upon the war power alone. After it had been sent to the President for approval, it became known that he proposed to veto it. His objections were ascertained, and an explanatory resolution was hurriedly adopted to meet his views.[3]

Its most important provision was that the punishment and proceedings under the act should not "be so construed as to work a forfeiture of the real estate of the offender beyond his natural life." This was an effort to reconcile the act to the prohibition in the constitution against forfeiture for treason; the futility of the effort appeared from the fact that the forfeiture effected by the act was in no sense the result of an attainder of treason. Granting the power of Congress to devise an extra-constitutional method of depriving a man of his property, it was folly to regard constitutional limitations in applying the device. Attainder of treason does not result from a proceeding *in rem*, but from conviction in a criminal proceeding *in personam*.[4] The

[1] Halleck, International Law, pp. 456, 457, and authorities cited.
[2] *Cf.* Lincoln's message, McPherson, Rebellion, p. 198.
[3] Public Resolutions, 2d sess., XXXVII. Cong., no. 63.
[4] Cooley, Constitutional Limitations, p. 317.

effect of the resolution, therefore, was simply to impair the utility of the act, while in no way affecting the constitutional question.

Again, the idea that an action *in rem* is such "due process of law" as the constitution contemplates in the deprivation of property, is wholly contrary to the spirit of the bill of rights. The theory of the action *in rem* is that the "thing" is an instrument, a necessary participant, as it were, in the violation of some law. The provision of the constitution refers to criminal procedure against the person. No such distortion of the organic law is necessary. Any attempt to reconcile the act with the guarantee of civil rights leads to absurdities. Such was the consistent position taken by the radical advocates of confiscation, and such is the only position justified by the logic of facts.

But very important results are secured by pursuing further the line of argument adopted by the radicals. The benefits of the constitution must be denied to those who refuse to recognize its authority. Such denial, however, does not relieve the offenders of their responsibilities under the fundamental law. Circumstances may force the government to regard certain citizens of the United States as enemies engaged in war. In such a state of affairs, many provisions of the constitution become inoperative. In other words, since the government itself is the judge of the circumstances, the government may suspend certain parts of the organic law. But not only that. The suspension of the constitution is not absolute. While the right of jury trial, for example, *may* be denied under the authority of Congress, it may also be allowed. A man's property may be seized by virtue of the war power, but at the same time the man himself may be tried and hung for treason under the regular civil procedure. "We may treat them [the rebels] as traitors, and we may treat them as enemies," said Trumbull, "and we have the right of both belligerent and sovereign, so far as they are concerned."[1] Such is undoubtedly the theory to be deduced from all the circumstances of the government's action in reference to confiscation. Con-

[1] Globe, 2d sess., XXXVII. Cong., p. 943.

gress strove to work on the line of absolute power; the President clung to the idea that constitutional restrictions must be respected. An incomprehensible compromise was the result.[1]

Sections 9–12 of the confiscation act had reference to negroes. Slaves of persons engaged in rebellion against the government of the United States, coming into the lines of the army, or captured from their masters, or found in places once occupied by rebel forces, were declared free. Fugitive slaves were not to be given up except upon the claimant's making oath that the owner had not borne arms against the United States in the present rebellion, or given aid and comfort thereto. The President was authorized to employ negroes in suppressing the rebellion, and also to make provision for the colonization of the freedmen in some foreign country.

The treatment of the negro question was freely admitted by all the friends of the confiscation bill to be a very important, and by some to be the most important feature of the act. Vexatious complications had arisen in disposing of the fugitive slaves that could not be kept from coming within the lines of the army. The President's patience had been severely tried in his efforts to restrain the ardent abolition spirit of some of his generals.[2] While he looked forward to the possibility of a situation in which military necessity would justify emancipation, yet he considered the political horizon, especially in the border states, too threatening to permit precipitate action. But the radicals in his party denounced his hesitation as pusillanimous, and were only too ready to attain their end through the legislative department. Confiscation seemed an easy and suitable path by which to penetrate the stronghold of slavery. By the act of August 6, 1861, slaves used for the purposes of the insurrection had been declared free. The principle was that, under such circumstances, slaves were contraband of war. But the basis of the later law was the right to free a man's slaves as a

[1] As illustrating the struggles of the courts in construing the act, see decisions of District Judges Betts and Underwood, and others, collected in the Annual Cyclopedia for 1862–64, under the title "Confiscation."

[2] Especially Fremont and Hunter. See McPherson, Rebellion, pp. 247, 251.

penalty for the master's participation in the rebellion. There was no essential distinction between the right of Congress to confiscate *choses in action*, and its right to take from the rebel his claim to the services of a negro. The institution of slavery was not touched, and the peculiar significance of these provisions lay in the fact that they were dictated by a sentiment in the North that would not long be satisfied with such moderate measures.

By the confiscation act and the discussions incident to its consideration, the attitude and powers of the United States government toward such of its citizens as were proclaimed public enemies were more or less satisfactorily determined. It was in connection with the civil rights of citizens not in rebellion, however, that the most radical modifications of the *ante bellum* constitution were effected, and the most far-reaching conception of the war power was attained. The question as to the extent of the government's authority over the life, liberty and property of the individual in states not in insurrection was complicated by the controversy over the proper department for exercising such authority. It has already been stated[1] that the action of the President in suspending the writ of *habeas corpus* of his own accord in 1861 had excited a discussion of his power to do it, and that Chief Justice Taney had given an opinion against the right. The impotency of the judiciary as against the executive, and the neglect of Congress to take any action on the matter, had left the administration in a position to realize its own ideas of its powers. By degrees, the suspension ordered by the President in April and May of 1861 had been extended all over the country. Arrests of disaffected persons and Southern sympathizers under secret orders from Washington had gone on without ceasing, and in no case was the service of the great writ allowed. Not only in Maryland, and the regions near the seat of war, but in the most distant parts of the land, from Maine to California, men were seized without any information as to the charge against them, and confined in forts and prison camps. It was

[1] *Supra*, pp. 174, 175.

not denied by the friends of the policy that frightful injustice was often done, but that fact was rightly held to have no bearing on the question of power involved. If the constitution of the United States vested in the executive, in time of war, absolute discretion as to the means to be employed to carry on the war, whatever evils resulted from the exercise of this discretion must only be added to the aggregate of misery of which a resort to arms is the cause, and so must be regretted, but sternly endured.

The constitutional law of the case embraces two considerations: first, the President's right to arrest an individual, and second, the right to hold the prisoner. On September 24, 1862, a proclamation was issued from Washington, ordering, first, that as a necessary measure for suppressing the existing insurrection, all persons "discouraging volunteer enlistments, resisting military drafts, or guilty of any disloyal practice affording aid and comfort to the rebellion," should be subject to martial law, and liable to trial by courts-martial or military commissions; and second, that the writ of *habeas corpus* should be suspended in respect to all persons arrested or held by military authority. The basis of so extraordinary a proclamation is to be found in the apparently unimportant phrase with which the orders are introduced. The whole proceeding is "a necessary measure" of war. Granting that the oath to "protect and defend the constitution," and the mandate to "take care that the laws be faithfully executed," confer unlimited discretion as to means, nothing can be said against the legality of the President's orders. But on any other theory, it would be hard to justify them. The fourth article of the amendments to the constitution guarantees the security of the people, in their persons, against unreasonable seizures, and indicates that arrests are to be made through special warrants. On the theory under which the President acted in ordering arrests by military authority, this article of the constitution has no application to times of civil war.[1] It "speaks in reference to the normal condition of the

[1] Binney on the Habeas Corpus, p. 55; Whiting, War Powers under the Constitution, p. 176.

country only." When war exists, the President has the right to arrest and detain on his own motion.[1] So the fifth amendment, also, which forbids the holding of any one unless on action of a grand jury, loses its force under such circumstances.

The second part of the proclamation was essential to the efficiency of the first. Together, they constituted a perfect platform for a military despotism. When, in the course of the year 1862, the growing prominence of the emancipation policy had dampened the enthusiasm of the masses, and drafts became necessary to meet the demands for troops, the opposition to the government grew so pronounced that military arrests became exceedingly frequent. The people took alarm, and in the congressional and state elections of 1862, the results were disastrous to the dominant party. Some action by the legislature then became imperative. Bills touching the subject were promptly taken up, but the discussions were so violent that the great law was not passed till the close of the session.

The interpretation of the clause of the constitution relating to the suspension of the writ of *habeas corpus*, was not, however, definitely decided. It was admitted on all sides that the general impression, from the foundation of the government, had been that the power of suspension was in Congress. The insertion of the clause in the article relating to Congress indicates that such was the idea of the committee on style and revision in the Convention. As first presented to the Convention and referred to the committee of detail, the clause contained the words "by the legislature."[2] Tucker's Blackstone and Story's commentaries assume without discussion that Congress alone can suspend the writ. The Supreme Court indicated such an opinion in Bollman and Swartwout.[3] And especially significant of the early idea is the fact that when, in 1807, a bill was proposed suspending the writ in connection with Burr's conspiracy, a long and violent debate in the House disclosed not the slightest intimation that any one suspected that the power was in the President.[4] The administration, however, had been justified by

[1] Binney, p. 6. [2] Elliot's Debates, V. 445. [3] 4 Cranch, 75.
[4] Annals of Congress, 2d sess. IX. Cong., p. 402 *et seq.*

opinions from eminent lawyers, and officially by that of the Attorney-General. The grounds on which these views were based were generally technical rather than historical, and arguments were deduced from the circumstances and necessities of the present rather than from respect for the past.

Congress devoted itself to a course of procedure based upon a recognition of matters as they stood. The act of March 3, 1863,[1] first authorized the President, during the rebellion, to suspend the privilege of the great writ "in any case throughout the United States, or any part thereof." It then provided for the discharge of such persons as were in duress, upon failure of the grand jury to indict them, and for the judicial examination within twenty days of all persons hereafter arrested under orders of the administration. To check the torrent of prosecutions for malicious imprisonment that was threatening United States officers everywhere, it was enacted that the order of the President should be a sufficient defence in any such action. In other words, Congress declined to say whether or not the administration had acted illegally, but went so far as to protect it from any consequences if it had so acted. Provision was also made for the removal of all actions arising out of acts done under executive authority, from the state to the federal courts.

So far as concerned the past course of the administration, Congress undoubtedly took the wisest steps possible under the circumstances. Indemnifying the executive officers against suits for damages was a concession to the view that the President was correct in assuming the right to arrest and hold suspected persons; while the authorization to suspend the writ indicated that the power to suspend was in Congress. The only constitutional principle that can be deduced from the act as a whole is that the President may in an emergency exercise the right to arrest and detain individuals until Congress acts.

In pursuance of the authority of this act, Mr. Lincoln proclaimed a general suspension of the privilege of the writ of *habeas corpus* on September 15, 1863. The effect of the suspension was limited to persons held as "prisoners of war, spies, or

[1] Public Acts, 3d sess. XXXVII. Cong., ch. lxxxi.

aiders or abettors of the enemy," and such as were amenable to the Articles of War. How elastic these limits were may be judged by the interpretation put upon "aiders and abettors."

> He is a public enemy who seeks falsely to exalt the motives, character and capacity of armed traitors, to magnify their resources, *etc.* He who overrates the success . . . of our adversaries, or underrates our own, and he who seeks false causes of complaint against the officers of our government, or inflames party spirit among ourselves, gives to the enemy that moral support which is more valuable to them than regiments of soldiers, or millions of dollars.[1]

With such perfect facilities afforded by law, it is scarcely to be wondered at that in many cases the practical construction of the proclamation was the arrest of anybody who expressed dissatisfaction with the administration. The boundary line between political opposition to the President and treason became extremely hazy in the eyes of the President's agents.

In addition to the free exercise of the right to arbitrarily arrest and hold citizens by military authority, the practice grew up, early in the war, of bringing arrested persons before military commissions and passing sentence upon them after summary proceedings of a quasi-judicial character. By the President's proclamation of September 24, 1862, all rebels and insurgents, and their aiders and abettors, and all disloyal persons generally, were declared subject to trial by court-martial or military commission. The latter organization had no legal existence in the United States when the President thus conferred jurisdiction upon it. Its actual power, however, became unmistakably manifest. It is to be noticed that with the recognition of the military commission, a complete judicial system existed outside of the ordinary civil and criminal courts. The whole process of arresting, trying, convicting and executing a man could be carried through without any recourse to the constitutional judiciary, and with no security whatever against the arbitrary will of the military commander. Such a state of things was held to be the necessary consequence of a rebellion which called for the exercise of the war power.

[1] Whiting, War Powers, p. 197.

The *habeas corpus* act of 1863 provided for the trial of all political prisoners by the civil authority, and thus seemed to cut off from the military courts the jurisdiction over civilians. But in spite of this the application of martial law continued in all the Northern states. Efforts to secure a judgment of the civil judiciary upon the validity of the extraordinary tribunals all proved ineffectual till after the war had ended. Then, in 1866, in the case of *ex parte* Milligan,[1] the Supreme Court determined their relation to the constitution.

According to United States army orders, the military commissions were to administer the "common law of war," or, in other words, to execute martial, as distinct from military, law.[2] In assuming the right to try citizens of loyal states by purely military procedure, Mr. Lincoln asserted the existence of martial law, in its most unlimited sense, throughout the whole United States. Martial law is well understood to be practically no law — merely the unregulated will of a military commander, sanctioned by physical force.[3] Under its sway the whole machinery of civil justice disappears. The exigencies of active warfare bring the theatre of actual army operations into this condition by the very nature of the case. But the question raised by the President's action was whether there could be a constructive exigency of this sort — whether martial law could supersede civil law, not by the actual presence of contending forces and the actual destruction of the civil administration, but by the opinion of either the President or Congress that the necessity existed which would justify the supersession. It cannot be denied that the war was carried through on the latter theory. The records of the war department contain the reports of hundreds of trials by military commissions, with punishments varying from light fines to banishment and death.[4] Congress, moreover, asserted its control over the subject by indemnifying officers against prosecutions for acts done under

[1] 4 Wall., 2.

[2] *Ex parte* Vallandigham, 1 Wall., 249; *ex parte* Milligan, 4 Wall., 142.

[3] See Garfield's argument, 4 Wall., 47.

[4] Digest of Opinions of the Judge Advocate General, p. 334.

the President's orders organizing the commissions.[1] It further gave legal sanction to the military tribunals in the reconstruction acts, though here there was a doubt as to whether the status of the region was that of peace or of war.[2]

But the judgment of the Supreme Court in Milligan's case was a clear and explicit denial of any power in either executive or legislative department to suspend the operation of the laws protecting civil liberty. In the first place it was held that the suspension of the privilege of the writ of *habeas corpus* did not establish martial law, as had been claimed by the executive. That act merely shuts off for the time civil inquiry into the reasons for military arrests. As to the main question, the government claimed:

> When war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the executive, substitute military force for and to the exclusion of the laws, and punish all persons as he thinks right and proper, without fixed or certain rules.

The necessities of the service, it was argued, required the division of loyal states into military districts, and this, in a military sense, constituted them the theatre of military operations. This conclusion the court flatly rejected, and sought some palpable objective fact that should alone justify the existence of arbitrary rule. This was found in the condition of the courts of justice.

> Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. . . . Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.

The safeguards thrown about the liberty of the individual by the constitution could be disturbed by neither President, nor Congress, nor the judiciary, except so far as concerned the writ of *habeas corpus*. Physical force alone could override the organic law.

[1] Act of May 11, 1866.

[2] See opinion of Attorney-General Hoar: McPherson, Reconstruction, p. 477.

The opinion of the court was dissented from by four of the justices, on a single point, namely, the denial of the power in Congress to declare martial law. That this power was in the legislature, though not exercised during the war, was deduced from the authorization to make rules for the army and navy, in connection with the exception in the fifth amendment, of "cases arising in the land and naval forces, or in the militia in actual service in time of war or public danger." [1]

The action of the political departments is in direct contradiction of the judiciary on this vital question of the war power. The whole subject of extraordinary authority is involved in the determination of such a case as that of Milligan. To maintain that the framers of the constitution contemplated vesting in any man or body of men the discretionary right to set aside any of its provisions, seems too much like judging the past in the light of the present. To believe that the Nation could have been preserved without the exercise of such a discretionary power involves too severe a strain upon the reasoning faculties of the careful student of the times. Two methods may be suggested of reaching a satisfactory conclusion on the question; either to consider that the war wrought a great modification in the canons of interpretation applicable to the organic law, or to recognize the fact that in the throes of the rebellion a new and adequate constitution developed out of the ruins of the old.

In a conflict like the Civil War, it was inevitable that the balance of powers supposed to have been realized by the convention of 1789, should be seriously disturbed. Under the overpowering influence of circumstances, the distinction between executive and legislative functions became very uncertain. The doctrine, severely denounced by the court in the Milligan case, of a "necessity" that could override all constitutional restrictions, left both Congress and the President without fixed bounds to their respective powers. To Congress was ascribed the right to make any enactments that should tend to weaken the enemy. In the President, by virtue of his authority as commander-in-chief, were vested the

[1] 4 Wall., 137.

unlimited powers of martial law. On the supposition that his will was supreme wherever troops were stationed,[1] the presence of recruiting camps and draft offices in all parts of the country justified the assertion of the President's independence of Congress's legislation. So while the legislature was endowed with unlimited power to make laws, the executive was endowed with unlimited power to disregard them.

This paradoxical conclusion was the consequence of a palpable perversion in the conception of "military necessity." As known to the rules of war this term has no application whatever to the reign of law. It only describes the subjective motive on which an officer acts in adopting measures for the safety of an organized force, or for the success of its operations in the field when civil law is overthrown. To derive from such a principle unlimited authority for a legislative body exercising delegated powers was logical absurdity. The true principle on which alone Congress could justify extra-constitutional legislation is expressed in that confessedly revolutionary maxim — *salus populi suprema est lex.*

But, besides the confusion which arose between the legislative and the true military "necessity," a further misconception appeared in regard to the effect of existing war on the President's civil authority. On the correct understanding of the executive's war power, it can attach only to his office as commander of the army. No effect whatever can result in the performance of his civil duties. As chief civil executive his actions relate to the laws of Congress; as chief officer of the army and navy, he is concerned with situations where there is no law. Questions of policy affecting the regions where law and order prevail are no more in his power to determine in time of war than in time of absolute peace.[2] Yet it was urgently insisted in 1862 that a state of hostilities effected the immediate absorption of the President by the commander-in-chief. A striking evidence of the confusion on this point is the fact that the Emancipation Proclamation was countersigned, not by the Sec-

[1] Whiting, War Powers, p. 201.

[2] Brown *vs.* U. S., 8 Cranch, 129.

retary of War, but by Wm. H. Seward, Secretary of State. There seemed to be some idea that this military order was endowed with extraordinary authority by the endorsement of the civil branch of the administration.

In view of the position which the institution of slavery had occupied in the political history of the United States, it is unnecessary to make an elaborate argument to prove that any measures affecting the institution would fall under the designation of questions of policy. The social system which had occasioned the exciting struggle of 1820, which had kindled the flames that raged with slight intermission from 1835 to 1860 and culminated in the explosion of 1861 — that system certainly demanded now, as it had always heretofore received, a treatment determined by legislative deliberation rather than by arbitrary executive will. But "military necessity" had proved so potent a force already that the anti-slavery partisans insisted on applying it to their purposes.

The circumstances under which the Emancipation Proclamation was issued by Mr. Lincoln are well-known facts of history. That it did not accord with his personal views of power and policy seems to be well established. The "pressure" to which he alluded in his conferences with border state representatives, finally proved too strong for him to resist, and overcame his resolution to adopt the method of emancipation with consent and compensation.[1] While many of the radicals disdained to discuss the legality of military manumission, and scouted the existence of any law in war above the will of a commander, others recognized the advisability of formulating a theory to rest the desired process upon. Precedents and opinions were sought for with but moderate success. British generals in the Revolutionary War carried off slaves, though not necessarily to set them free. In the War of 1812 also, the negroes were invited to join the enemy's standard. The action of the French in San Domingo was cited, though the consequences that ensued were not particularly dwelt upon.[2] But

[1] See McPherson, History of the Rebellion, p. 214. Also, *North American Review*, N. S., vol. 130, p. 170.

[2] Whiting, War Powers, pp. 71 and 72.

these cases were to illustrate the law of nations on the point. The first and in fact the only advocate of the power under our constitution in particular was John Quincy Adams. In the course of his arduous struggle against slavery in the House of Representatives, the ex-President had on several occasions taken strong ground for the right of Congress to interfere with slavery under the war power. And carrying the principle further, he maintained that "not only the President of the United States, but also the commander of the army, has power to order the universal emancipation of the slaves."[1] If the power appertains to a military chief as such, Mr. Adams was unquestionably right in attributing it to the commander as well as to the President. But the difficulty lies in the scope of pure military law. How far can the decree of a commanding general be effectual in fixing the judicial status of the slave? It may be taken for granted that a commander can make temporary disposition of either property or men that come into the control of his army. But will that disposition be held conclusive when peace and the reign of civil law are re-established? And again, can the authority of a military officer extend to persons and property beyond the reach of the army?

The efficacy that was generally attributed to the decree of the President, as definitely abolishing slavery in the United States, was a deduction from the prevalent doctrine heretofore noticed, which made no distinction between the powers of President and those of commander-in-chief. To question the authority of the proclamation in the Southern states was considered equivalent to recognizing the independence of those states. But, in fact, no such idea was involved. As civil executive, Mr. Lincoln was President of all the states, South as well as North. But as civil executive, he could never have issued the proclamation. Only as commander of an army did he issue it; and the fact that his civil functions embraced the whole territory of the United States, could in no way extend his military authority to regions where he had no army to command.

It has been often said that the first of January, 1863, marks

[1] Quoted in Whiting, p. 81.

the most distinct epoch in the history of the war. The Emancipation Proclamation is assumed as the dividing line between the old system and the new. This view is more appropriate to the state of affairs in the South than to that in the North. It is unquestionably true that Lincoln's decree furnished the Southern leaders with a most effective instrument for the consolidation of sentiment in the Confederacy. From that time the South was a unit, and her struggle was a desperate battle for existence. But in the North, on the other hand, the triumph of the radicals over the President awakened feelings of apprehension among all the other political factions. Mr. Lincoln admits, in his message to Congress in December, that the issue of the proclamation "was followed by dark and doubtful days." Nor was the gloom confined to the political arena. The bloody reverse at Fredericksburg, the narrow escape from disaster at Murfreesboro, and later the disheartening defeat at Chancellorsville, involved the military situation in hopeless uncertainty. Meanwhile, the discussion of the *habeas corpus* bill and the conscription act in Congress and in the country at large aroused the bitterness which culminated in disturbances like the draft riots. In all respects the first half of the year 1863 was the period of lowest ebb of the national fortunes. The turn of the tide came with the Nation's birthday. In the field, Gettysburg and Vicksburg marked the change. The stern enforcement of the conscription act was successful finally in putting the government on a firm footing with respect to men, while the enormous loan of $900,000,000, authorized by the last Congress, satisfactorily settled the matter of supplies.

At this time the centralization of power in the executive had reached its climax. The vast authority which by wide implication or bald assumption had been derived from the constitution for Congress, had been turned over almost bodily to the President. In addition to the powers conferred by the confiscation and *habeas corpus* acts, the enrollment act of March 3, 1863, had overturned the old state militia system, and had created a United States militia, from which the President was authorized to draft men at his pleasure. Though the constitutionality of this act

was violently assailed, the power given to Congress "to raise and support armies" was ample to cover the ground, and the force of the assaults fell chiefly upon the centralizing tendency of the bill.[1] It was much too late in the day, however, for any successful effort to check the flood that was sweeping away the old conservative landmarks. The ruling statesmanship of the time demanded that the territorial unity of the Nation should outweigh all other considerations. By the summer of 1863, the question of war powers in the general government for the suppression of insurrection had been definitely settled. The military result of the war became only a question of time.

Important legal and political results had already been attained. The most obvious of these was the final disappearance of the assumed right of state secession, and with it the whole doctrine of state sovereignty in all its ramifications. For, while it is often said that a right cannot be destroyed by force, the maxim refers rather to the abstract moral conviction than to the concrete legal privilege. The effort to exercise the alleged right had failed; and whether the means employed to prevent the exercise were revolutionary or not, the constitutional law of the country can take cognizance only of the results. But if the right of a state as an organized community to sever its political relations with other communities does not exist, there can be no claim of sovereignty for the state. For if political sovereignty means anything, it includes the attribute of self-determination as to its status in respect to other sovereignties. Limitation in this attribute is fatal to the conception of sovereignty, and accordingly, the failure of secession removed one pregnant source of confusion at the very basis of our system.

WM. A. DUNNING.

[1] See Bayard's Speech, Globe, 3d sess. XXXVII. Cong., p. 1363.